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FILED
OCT 28 1982
ALEXANDER L. STEVAS,
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No. 82-609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SEDCO INTERNATIONAL, S.A., SEDCO, INC., and SEDCO ENERGY CORPORATION (formerly TerraMar Consultants, Inc.),

Petitioners,

v.

WILLIAM F. CORY and MARCELLA McKILLIP, Executors of the Estate of Roy J. Carver, Deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

"BRIBERY"

Whether this court should review decisions regarding a claimed illegal payment when:

(a) The payment was collateral to Carver's main cause of action for SEDCO's fraud,[1] and Carver was not permitted to recover the payment from SEDCO.[2]

(b) SEDCO previously established a pattern for such payments, SEDCO having paid millions of dollars to the same persons.[3]

(c) The payment was made at SEDCO's insistence and SEDCO sought to conceal it.[4]

(d) No business was obtained as a result of the payment.[5]

(e) SEDCO asserts the payment as a defense to what the court of appeals found to be SEDCO's "evil" and "brazen deceit."[6]

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[1] Appendix B-53 to B-60; B-121 to B-132; A-17 to A-19

[2] Appendix B-121 to B-132

[3] Infra, p. 7

[4] Appendix B-58 to B-59

[5] Appendix B-60

[6] Appendix A-18

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STATUTES AND RULES

28 USC § 1332 (a) (1):

"Diversity of citizenship; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States. . ."

Supreme Court Rule 17:

"Rule 17. Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari."

Federal Rule of Evidence 103(a) (2):

"Rulings on Evidence.

(a) Effect of erroneous ruling — Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

* * * *

(2) Offer of proof — In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

Federal Rule of Evidence 501:

"General Rule.

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

STATEMENT OF THE CASE

The district court found, upon the basis of clear, satisfactory and convincing evidence, that Carver's losses were caused by SEDCO's fraud. (Appendix B-147) This finding was not challenged by SEDCO on appeal. (Appendix A-3 to A-4)

The issues entitled "Attorney-Client Privilege" and "Bribery" were considered and decided by both lower courts adversely to SEDCO on the basis of a factual situation far different from the one petitioner argues here.

STATEMENT OF THE FACTS

In 1973 SEDCO drilled a number of wells offshore Qatar in the Persian Gulf for a Japanese consortium. Three of the wells produced oil, but after spending $34 million, the Japanese abandoned the project due to inadequate reserves, a high water cut and the presence of enormous quantities of hydrogen sulphide, which made the project economically unviable. SEDCO knew this.

In 1975 SEDCO solicited a contract from Carver to reopen the old Japanese wells, misrepresenting the reserves, the condition of the wells and concealing from him both the hydrogen sulphide content and its own prior analysis of the economic unviability of the wells. Relying on these representations, Carver was persuaded to apply for concession rights which SEDCO assured Carver it could get by reason of its long-time friendship with Ali Jaidah, director of petroleum affairs for Qatar. The concession was obtained and Carver entered into a drilling contract with SEDCO as well as a companion agreement with SEDCO's consulting division, TerraMar, for supervision of the operation.

After a period of six months of purported workover and testing, no well had been reopened and the test results did not indicate oil in commercial quantities. However, SEDCO falsely reported to Carver that the wells had been successfully reopened and had tested oil in substantial quantities. The trial court found:

> "In keeping with the pattern of misrepresentation that pervades this case, the true state of affairs at the well sites was never fully disclosed and was sometimes affirmatively misrepresented to Carver during the workover period." (Appendix B-64 to B-65)

The concession was eventually cancelled by Qatar, found by the district court to be:

> ". . . simply another result of the initial and continuing fraud that was perpetrated on Carver. . ." (Appendix B-104)

Carver spent some $15 million on the venture before the termination, all of the same as the direct and proximate result of SEDCO's fraud. (Appendix B-143, et seq)

SUMMARY OF THE ARGUMENT

After approximately three years of extensive discovery, this case came on for trial for a period of five weeks before an experienced United States district court judge, who exhaustively analyzed and discussed the legal and factual issues and in an opinion of 154 pages of the appendix the court found on the basis of clear, satisfactory and convincing evidence that respondents' decedent, Carver, had sustained losses by reason of fraud by SEDCO, which "pervaded the whole case."

In its appeal to the United States Court of Appeals for the Eighth Circuit, SEDCO did not challenge the finding of fraud. Neither did it raise any question of due process.

The issue of attorney-client privilege was purely evidentiary. In considering the matter, the district court and the court of appeals applied state law as required by Federal Rule of Evidence 501. SEDCO does not challenge either the applicability of state law or its interpretation.

The court of appeals also applied the rule that district courts possess broad discretion in making evidentiary rulings which will not be disturbed absent showings of abuse of discretion and resulting prejudice, citing well established authority. It also made the factual finding that SEDCO had failed to show, by offer or otherwise, any prejudice or abuse of discretion, as required by Federal Rule of Evidence 103(a) (2).

In the so-called "bribery" question the district court held that the payment made was against public policy, therefore illegal, and Carver could not recover the same. As to whether or not the payment barred Carver's main action against SEDCO, the court found that the payment was collateral to Carver's main cause of action, in keeping with well established decisions in this and federal courts generally.

The court found not only that the payment was collateral, but found also that it was conceived and instigated by SEDCO, which not only advised Carver it was legal but insisted upon the payment and later attempted to cover it up.

This factual finding by the lower court was not challenged by SEDCO on appeal and SEDCO has overlooked mentioning these facts in its application made here.

Both the lower court and the court of appeals, in addition to the finding that the payment was collateral, applied the rule that the real question in every case must be whether the ends of the law will be furthered or defeated by granting the relief asked. As the district court stated:

> "To the extent that either of the parties benefited because the payment was made, it was SEDCO that did so, not Carver. To bar all recovery by Carver would punish him out of all proportion to the magnitude of his offense while permitting SEDCO to reap the benefits of its own more pervasive wrongdoing." (Appendix B-131)

In affirming, the court of appeals stated:

> "To rule that the payment bars all recovery, however, would allow SEDCO to escape punishment for its evil." (Appendix A-18)

The legal rules adopted by the courts below are rules firmly established in the law. *National Bank & Loan Company v. Petrie*, 189 U.S. 423, 425 (1903); *Loughran v. Loughran*, 292 U.S. 216, 228 (1934); 6A *Corbin on Contracts* par. 1534 (1962).

In sum, a review by this court would involve only questions of evidence applied under familiar legal rules; the factual findings below are supported not only by substantial evidence but in most cases by undisputed evidence.

THE ATTORNEY-CLIENT PRIVILEGE

The trial court found, and the court of appeals agreed, that Carver relied solely upon SEDCO's misrepresentations and that his reliance was reasonable. (Appendix A-9) Both courts held,

and SEDCO agreed, that the governing case was *Lockard v. Carson*, 287 N.W.2d 871 (Iowa 1980), which held that reasonableness is a subjective standard — what the complaining party reasonably could be expected to do in view of his own information and intelligence. (Appendix A-10)

The representations relied upon were technical matters, such as the condition of the wells, the reserves and the quality of the oil, all of which was within the exclusive possession of SEDCO. Further representations concerned the conditions at the well sites and the purported test results, all of which was also in the exclusive possession of SEDCO. (Appendix B-25 to B-26)

There was never any showing, or indeed any claim, that SEDCO's attorneys had any technical knowledge or had any knowledge that these representations were untrue. (Appendix A-11)

The contention that SEDCO was denied cross-examination is untrue and was never in fact claimed on appeal. Pretrial, SEDCO took two extensive depositions of Carver. Only one question pertaining to Carver's attorneys was asked, and no motion to compel answers was ever made. (Appendix A-5 to A-6)

No pretrial motion was ever made requesting any specific ruling or referring to any specific questions. The motion was based on *Hickman v. Taylor*, 329 U.S. 495 (1947), to the effect that the attorney-client privilege does not protect information which an attorney gathers from independent sources and communicates to his client. The court sustained this motion and directed Carver to disclose any factual information and any business advice which his attorneys received from independent sources and communicated to him, which he thereafter did. (Appendix A-5)

Upon the trial, Carver was on the stand for the better part of three days and was cross-examined by SEDCO's attorneys for 181 pages of the transcript. There was no restriction of any kind upon this cross-examination. (Appendix A-6)

During the last hour of a five-week trial, Carver was recalled to the stand as SEDCO's witness and was asked approximately 50 all encompassing questions, some of which were answered and the rest were objected to on grounds of attorney-client privilege, irrelevance and the overly broad form of the question. (Appendix A-6)

The trial court sustained many of the objections on all three grounds (Appendix A-6, footnote 4) and the court of appeals affirmed, observing that only evidence as to technical information received would go to the question of reasonable reliance. The record was undisputed that all factual data or business advice which his attorneys had procured and conveyed to Carver had been disclosed.

The jurisdiction of this case being based upon diversity of citizenship, 28 USC § 1332 (Appendix B-6), the attorney-client privilege is determined in accordance with state law. Federal Rule of Evidence 501. SEDCO does not assert that the rulings on attorney-client privilege were not in accord with state law.

Additionally, the court of appeals invoked the undisputed rule that district courts possess broad discretion in making evidentiary rulings and its discretion would not be disturbed absent a showing of abuse and resulting prejudice. *Yost v. A.O. Smith Corp.*, 562 F.2d 592 (8th Cir. 1977). (Appendix A-10 to A-11)

SEDCO made no offer of proof as required by Federal Rule of Evidence 103(a) (2), nor any showing of prejudice. (Appendix A-11)

"BRIBERY"

When SEDCO first approached Carver in 1975, it advised him that it could get the concession for him by reason of its friendship with Ali Jaidah, director of petroleum affairs for Qatar, which would require an up-front payment or signature bonus of $500,000, and which SEDCO assured was customary and proper. (Appendix B-55) After the concession had been orally agreed to by the Ruler of Qatar, Ali Jaidah advised Carver that the "front money" was raised from $500,000 to $1,500,000 and that it must be paid to Kassem Jaidah, Ali's brother, in a Swiss bank account in Geneva. Carver objected but was advised by SEDCO's vice president, Amos Carter, that the payment was customary and proper and must be paid. On January 1, 1976, the agreement was formally executed and on January 6, 1976, Amos Carter called Carver and advised him that if he did not make the payment, the concession would be cancelled. Carver thereafter made the payment to Kassem Jaidah, Account No. 352723, Swiss Credit Bank in Geneva. (Appendix B-56 to B-59)

The pattern for such payments was set by SEDCO. Kassem Jaidah was SEDCO's agent, who had helped SEDCO get its concession with the Japanese to drill the area originally, for which SEDCO paid him a 4 percent commission and to whom SEDCO later paid a 4 percent commission on all money SEDCO received from Carver.

Between 1971 and the time of trial, SEDCO paid Kassem $1,427,546 and paid Ali and Kassem together the sum of $1,021,548. Many of these payments were made in cash into the same Swiss bank account upon the direction of SEDCO's president, Clements. (Exhibits 571 and 572)

Additionally, and also unknown to Carver, Kassem was a business partner of Amos Carter, SEDCO's vice president, both in the Middle East and in Texas. (Appendix B-59)

Eight days after Carver made the payment into Kassem's Swiss bank account, Kassem paid from the same account $300,000 to the account of Amos Carter in the same Swiss bank. SEDCO later attempted to cover up the character of the payment to Jaidah, and Carver refused. (Appendix B-59, footnotes 39 and 40)

The matter was exhaustively analyzed and considered by both the district court and the court of appeals. (Appendix B-53 to B-60; B-121 to B-132; A-17 to A-18) The district court found that SEDCO was acting in a fiduciary capacity with Carver and had advised him the payment was customary and proper; that Ali Jaidah and Amos Carter, SEDCO's vice president, were at the bottom of it, and that Ali Jaidah, Amos Carter, Kassem Jaidah and Robert L. Smith, president of SEDCO's division, Terra Mar, and certain others were a "tight little circle of friends and business associates, the details of whose relationship Carver did not learn until much later." (Appendix B-29) It found that:

> "Amos Carter's testimony as to his role in the payment and related matters to be untruthful or evasive at almost every point." (Appendix B-54, footnote 35)

The payment was made after the concession had been granted and the district court found that there was no evidence that the payment influenced the granting of the concession in any way. (Appendix B-60) The court also found that Carver might well have believed, in view of SEDCO's continued assurances, that the payment was legal and proper but that he should have known

otherwise and as a result, he would not be permitted to recover the payment itself, but could recover on his main action.

Both the district court and the court of appeals applied the well established rule that illegality constitutes no defense when merely collateral to the cause of action sued on. *National Bank & Loan Co. v. Petrie,* 189 U.S. 423, 425 (1903); *Loughran v. Loughran,* 292 U.S. 216 (1934).

Both courts invoked the equally established rule of law that the real question in every case must be whether the ends of the law will be furthered or defeated by granting the relief asked. *Corbin on Contracts,* 1962 edition, Volume 6A, par. 1534 at page 816.

REASONS FOR DENYING THE WRIT

Nothing presented herein comes within the language or the intendment of Supreme Court Rule 17. The decision is not in conflict with another circuit, no federal question has been decided in conflict with a state court of last resort, there has been no departure from accepted and usual course of judicial proceedings and no question of federal law has been decided contrary to decisions of this court.

The issues in the case were factual and were decided adversely to SEDCO by both courts below, according to principles well established by this court and in the federal courts generally for many years. No contention to the contrary is made by SEDCO, and nothing is presented which justifies the grant of a writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served copies of the foregoing respondents' brief on John H. McElhaney, Stanley E. Neely and Orrin L. Harrison III, 3600 Republic Bank Tower, Dallas, Texas 75201, by mailing on October 19, 1982.

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